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Supreme Court of the United States

OCTOBER TERM, 1944

No. 720

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Per Cent. Gold Bonds, Due 1945,

Petitioners and Appellants Below,

against

GUARANTY TRUST COMPANY OF NEW YORK and MERREL P. CALLAWAY, as Trustees of Seaboard Air Line Railway Company First and Consolidated Mortgage, dated September 1, 1915; *et al.*,

Respondents and Appellees Below.

Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees, *et al.*, Complainants, v. Seaboard Air Line Railway Company, *et al., Defendants.* Consolidated Cause. In Equity No. 214. And in the constituent causes numbered 213, 214, 228, 229, 172, 173, 174, 237 and 238 of said consolidated cause.

BRIEF IN OPPOSITION TO PETITON FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Opinions Below

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 145 Fed. (2d), at page 40. It is printed at R. Vol. III, pp. 9-39.

The opinion of the United States District Court for the Eastern District of Virginia is reported in 53 Fed. Supp., at page 672. It is printed at R. Vol. I, pp. 81-147.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (28 U. S. C., Section 347).

Brief Statement of Facts

Petitioners have presented none of the "special and important reasons" upon which this Court will grant review on writ of certiorari. They are asking this Court to consider whether the District Court in approving a plan of reorganization for Seaboard Air Line Railway Company (hereinafter called Seaboard) dealt fairly with the holders of bonds of Georgia & Alabama Railroad Company (hereinafter called the Georgia & Alabama Bonds). The Georgia & Alabama Bonds are one of ten underlying bond issues, each of which is secured by lien on a relatively small part of the properties of the Seaboard.

The total claims (as of January 1, 1944) of the securities to which allotments were made under the Seaboard Plan aggregated about $284,500,000. The total claim of the Georgia & Alabama Bonds was about $7,700,000, or about 2½% of the total (R. Vol. I, p. 80).

There are outstanding $6,185,000 of the Georgia & Alabama Bonds including $100,000 pledged as security under a lease. The affidavit filed by counsel for petitioners in the Circuit Court of Appeals (R. Vol. III, p. 6) indicates

that petitioners then claimed to represent about 10% of the Georgia & Alabama Bonds.*

The Seaboard has been in receivership since 1930. The Plan of Reorganization which the petitioners seek to have this Court review is the result of protracted hearings before a Special Master appointed in 1939 which covered a period of more than three years and subsequent hearings before Judge Chesnut, sitting for the United States District Court in the Eastern District of Virginia (hereinafter called the Virginia Court), and Judge Akerman, sitting in the United States District Court for the Southern District of Florida (hereinafter called the Florida Court), which lasted for several weeks.†

No appeals were taken from the orders of the Virginia Court and the Florida Court approving the Plan except by these petitioners and by one other individual owning a small amount of another issue of underlying bonds.

Parts of the property of the Seaboard are subject to the respective first liens of ten underlying mortgages, one of which is the mortgage securing the Georgia & Alabama Bonds. There were also involved in the reorganization three

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*The so-called "Underlying Committee" referred to in the petitioner's brief has approved the Plan, including the treatment of the Georgia & Alabama Bonds. A total of $4,112,000 of the Georgia & Alabama Bonds (or 68% of the entire issue, excluding the pledged bonds) has become subject to the Plan either by deposit with the Underlying Committee or by deposit with the Reorganization Committee.

†Judge Chesnut and Judge Akerman sat together for the purpose of expediting the proceedings. After the hearings the Virginia Court entered an order approving the Plan and wrote an opinion. The Florida Court (being the ancillary Court) entered a confirmatory order but did not write an opinion. The appeal to the Circuit Court of Appeals for the Fourth Circuit involved, of course, only the order and opinion of the Virginia Court.

issues of general mortgage bonds, two collateral trust issues, and five issues of bonds secured by first liens on lines of railroad leased to the Seaboard.

The basic problems in the reorganization were (a) to determine a capitalization of the reorganized company consistent with the public interest and in accordance with the principles adopted by the Interstate Commerce Commission in the reorganizations under Section 77 of the Bankruptcy Act and (b) to determine the relative values of the different properties on which the several mortgages constituted liens, so that the authorized capitalizatic could be equitably distributed.

The capitalization fixed by the Special Master and approved by the Courts was $196,870,000 (R. Vol. III, p. 13), an amount substantially less than the total outstanding debt of the Seaboard (R. Vol. III, p. 12). That capitalization has been approved by the Interstate Commerce Commission. A copy of the Commission's Report dated August 12, 1944 in Finance Docket No. 14500, is annexed as Schedule A. Petitioners do not urge that capitalization should be increased.

In a few cases the properties subject to the underlying mortgages were found to have a value for reorganization purposes exceeding the total claim of the underlying bonds secured by first lien thereon. In those cases the securities representing such excess value were distributed to the general mortgage having the next junior lien on those properties. In the case of the property securing the Georgia & Alabama Bonds, however, the Special Master found, and the District Courts agreed, that the value of that property for reorganization purposes was less than the claims of the holders of Georgia & Alabama Bonds. Accordingly, no new

securities were allotted to anyone other than the holders of the Georgia & Alabama Bonds in respect of the property securing those bonds. The Georgia & Alabama lines were "deficit lines" that is, lines which showed no earnings available for interest under the segregation formula for periods prior to the war.

The testimony at the hearing before the Courts was to the effect that the Seaboard would not lose any material amount of business if the Georgia & Alabama were not a part of the System and that the Georgia & Alabama would not be "economically justified as a separate independent railroad there by itself."

Petitioners came into this case at a late stage of its development. They did not appear at the hearings before the Special Master. They appeared at the hearings before the Courts in October, 1943, but they did not offer any evidence at those hearings although given full opportunity to do so. It has been admitted by their counsel at hearings in these proceedings that substantially all of the bonds represented by the petitioners were acquired by their present owners after the hearings before the Special Master had been completed.

The statement of facts contained in the petition contains certain misstatements of fact, some of which are as follows:

1. Petitioners repeatedly state that the so-called "Compromise Committee" purported to act in a "judicial" capacity. The record shows that that statement is unfounded. It shows (R. Vol. I, p. 414) that they "have considered themselves to be in the position of officers of the courts." The Committee had no authority except to confer with the parties and make recommendations to the

Courts. The true nature of its duties and powers is indicated by the fact that both the District Court and the Circuit Court in their opinions refer to the Committee as a "Conference Committee". The opinion of the Circuit Court of Appeals describes the functions of the Committee as follows (R. Vol. III, p. 11):

> "In the interval between the second and third sessions a Conference Committee appointed by the Court considered the testimony that has been offered, conferred with interested parties and recommended modifications of the Master's plan, which the Court approved."

The petitioners also state on page 6 of the petition that the Committee gave no reason for its recommendations. The report of the Committee and the exhibits filed in connection with that report (R. Vol. I, pp. 413 to 433) clearly set forth the reasons for the recommendations.

2. On page 7, and again on page 11, the petition states that the securities allotted to the Georgia & Alabama Bonds were "valued at" certain specified amounts. No dollar values were assigned by the District Court to any of the new securities.

3. The petition states on page 10:

> "It was recognized by the District Court and practically all of the parties in interest that these huge wartime earnings were entirely due to traffic contributed by the various underlying divisional lines and that all the underlying divisional lines were earning huge sums during the years 1942 and 1943, particularly those lines which * * * were denoted as 'deficit lines'."

The citations from the record which are cited as supporting that statement do not support it. There is no evidence what-

soever that the wartime earnings were entirely due to traffic contributed by the lines subject to the underlying divisional mortgages or that the "deficit lines," of which the Georgia & Alabama was one, showed an increase in earnings during the war years relatively as great as, or greater than, the increase shown by the lines which had been profitable prior to the war.

4. The petition states on page 16 that it became apparent that the Underlying Bondholders Committee (which represented the Georgia & Alabama Bonds and other underlying divisional mortgages) "favored the so-called 'earning divisions' represented by it." No record citations are given to support that statement and even a casual examination of the record will show that it can not be supported. In fact the Underlying Committee made most earnest and serious efforts throughout the proceedings to improve the position of the weaker underlying issues (the deficit lines) at the expense of the general mortgage issues secured primarily by second liens on the profitable underlying divisions.

These petitioners presented no evidence before the District Courts. They relied entirely on the evidence presented by the Underlying Committee. They made no arguments before the District Courts on behalf of the Georgia & Alabama Bonds other than arguments which had been made or were then being made by Mr. France as counsel for the Underlying Committee or by the Underlying Committee's expert, Mr. Wyer. Every contention made by these petitioners was also made by the Underlying Committee on behalf of the Georgia & Alabama and other "deficit lines."

5. The petition states (p. 10 and p. 37) that the Tertiary Allocation "applied to only a small portion of the new

securities released." The Tertiary Allocation was the allocation among all outstanding issues, on the basis of their estimated relative shares in 1942 and 1943 earnings, of certain First Mortgage Bonds which had been allocated under the Special Master's Plan to Receivers' Certificates subsequently paid, and certain cash and junior securities released by other modifications of the Special Master's Plan. In fact the Tertiary Allocation applied to nearly $2,000,000 of cash, nearly $10,000,000 of First Mortgage Bonds (almost one-third of the entire First Mortgage issue) and substantial amounts of junior securities. Of those reallocated securities the Georgia & Alabama Bonds received 3.087% (R. Vol. I, p. 411).* Petitioners do not claim that their contribution to wartime earnings exceeded 3%.

The Questions Sought to be Raised by the Petition

Petitioners enumerate eleven questions on which they base their request that this Court grant certiorari. Of the eleven questions all but the first four and the last one deal solely with the methods used by the Special Master and by the District Court in allocating new securities as among the several mortgage divisions of the Seaboard. Presumably, this Court will not concern itself with the details of methods used to determine the relative values of various sections of a railroad (see page 19, below).

The first question stated is based on an alleged conflict with the decision of the United States Circuit Court of

*The G&A Bonds received $361,018 of First Mortgage Bonds on the Tertiary Allocation (R., Vol. I, p. 80). Since their distribution ratio was 3.087%, it is clear that the aggregate amount of cash and First Mortgage Bonds distributed was the amount of which $357,408 is 3.087%, or about $11,700,000.

Appeals for the Second Circuit in *New England Coal & Coke Co.* v. *Rutland Railroad Co.*, 143 Fed. (2d) 179, (1944) on the question whether the Seaboard reorganization should be allowed to proceed in equity. There is no such conflict. The Circuit Court of Appeals for the Second Circuit in the *Rutland* case wrote a supplemental opinion on petition for rehearing, 143 Fed. (2d), 190, in which it expressly distinguished the Seaboard reorganization from the Rutland reorganization on the ground that the Seaboard receivership proceedings had started prior to 1933, when Section 77 became law, and were, therefore, not "irregularly instituted." (See p. 10, below). The opinion on rehearing is not mentioned in the petition herein, but it proves that the Second Circuit Court of Appeals itself considered that there was no conflict.

The second, third and fourth questions relate to the appointment by the District Courts of a Committee (referred to by the Courts as a "Conference" or "Compromise" Committee) to confer with the parties and to recommend for consideration by the Courts such modifications, if any, of the plan recommended by the Special Master as might be deemed fair and equitable. It is alleged by the petitioner that the appointment of the Compromise Committee "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

Petitioners did not object in the District Court proceedings to the appointment of the Committee or to the membership of the Committee, nor did they raise any question as to the propriety of the appointment of the Committee or its membership in their appeal to the Circuit Court of Appeals. They have waived any right to object at this

stage of the proceedings. In any event, the appointment of the Committee was entirely in accord with the usual reorganization procedure. (See p. 12, below).

The eleventh question presented by the petition is based on a claim that the Georgia & Alabama Bonds were not granted "compensation" for the loss of their first mortgage position, thus seeking to bring this case within the rule laid down by this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 318 U. S. 523, (1943). No such question can arise in this case, since no part of the value assigned by the District Court to the property securing the Georgia & Alabama Bonds was given to any security holder other than the holders of the Georgia & Alabama Bonds. (See p. 17, below).

ARGUMENT

POINT I

There is no conflict between the decisions of the Circuit Court of Appeals in this case and the decision of the Circuit Court of Appeals for the Second Circuit in *New England Coal & Coke Company* v. *Rutland Railroad Company*.

In *New England Coal & Coke Company* v. *Rutland Railroad Company,* 143 Fed. (2d) 179 (1944), the Circuit Court of Appeals for the Second Circuit held that the reorganization of Rutland Railroad Company could not proceed in equity after a petition for reorganization of that Company under Section 77 of the Bankruptcy Act had been duly filed by persons entitled to file such a petition under

Section 77. In that case the petition under Section 77 was filed by the debtor corporation. In the opinion in that case Judge Frank stated by way of dictum that since the enactment of Section 77 a consent receivership in equity is "a means for the frustration of the public policy of the United States embodied in Section 77." The receivership proceedings against Rutland Railroad Company were instituted in 1938, five years after Section 77 became law.

On motion for rehearing in the *Rutland* case the Circuit Court of Appeals for the Second Circuit handed down a supplemental opinion (143 Fed. (2d), 190, (1944)) denying rehearing but specifically distinguishing the *Seaboard* case from the *Rutland* case on the ground that the Seaboard receivership had been begun before the enactment of Section 77. The Court said:

> "But in the Seaboard case the equity receivership had been begun before the enactment of Section 77, so that it had not been irregularly instituted."

The institution of the Seaboard receivership in 1930 could not have been a violation of any congressional policy announced in 1933, when Section 77 was enacted.

Moreover, in the *Rutland* case a petition under Section 77 had been filed by the debtor, which was specifically entitled to file such a petition under the provisions of Section 77. In the *Seaboard* case no such petition has ever been filed either by the debtor or by any security holder or group of security holders. There is nothing in Section 77 which permits the institution of proceedings under that section by anyone other than the debtor or security holders. It would, therefore, have been impossible for the District Court to compel the institution of proceedings under Sec-

tion 77 even if that Court had desired to do so. All parties before the District Court, except these petitioners, expressed their desire that the reorganization should continue in equity, for the reason that a transfer to Section 77 at that late date would, it was believed, delay for many more years the completion of the reorganization.

The Circuit Court of Appeals fully discussed the *Rutland* case in its opinion (R. Vol. III, pp. 23-25).

So far as we know, the Seaboard reorganization is the only railroad reorganization now pending in equity proceedings. There is, therefore, no question of public or general interest for this Court to review in connection with the decision to permit the Seaboard reorganization to be completed in equity. The public interest will be served by the denial of the petition for *certiorari*, so that this reorganization may be promptly consummated, after so many years in the Courts.

POINT II

Petitioners did not object to the Committee in the Courts below, and may not be heard to do so now. In any event, the appointment of the Committee by the District Court was entirely consistent with usual, customary and proper reorganization procedure.

(a) Petitioners having accepted the Committee in the Courts below may now not object to the Committee.

Petitioners were present and participated in the hearings at which the Committee was appointed. They made no objection to the appointment of the Committee or to its membership. They conferred with the Committee and pre-

sented to the Committee their views as to the treatment which the Georgia & Alabama Bonds were entitled to receive. They opposed the recommendations of the Committee after they were made and appealed to the Circuit Court of Appeals from the decision approving a reorganization plan consistent with those recommendations, but they did not, in their appeal to the Circuit Court of Appeals, object to the appointment of the Committee or to its membership. Since no objection was made by petitioners to the Committee before the District Court, or on the appeal to the Circuit Court of Appeals, this Court will not consider any such objection as a basis for certiorari. *Robinson* v. *Belt,* 187 U. S. 41 (1902); *Duignan* v. *United States,* 274 U. S. 195 (1927).

(b) The appointment of the Committee was entirely proper and in accordance with accepted procedure.

In the first hearings before the Courts on the Plan approved by the Special Master the Courts found sharp differences of opinion among the actively interested parties as to many of the questions raised by the Special Master's Report.

The Courts, therefore, determined to appoint three of the counsel who had taken a leading part in the hearings as a Committee to meet with other interested parties, to consider the problems raised and to make recommendations to the Courts as to what modifications, if any, should be made in the Plan recommended by the Special Master.

The three persons appointed were Mr. Delano Andrews, representing the Committee for Consolidated Mortgage Bonds (one of the general mortgage issues); Mr. Joseph France, counsel for the Underlying Bondholders Committee; and Mr. E. S. S. Sunderland, counsel for the Trustee

under the Consolidated Mortgage. Those gentlemen were appointed because the Courts believed that through their intimate knowledge of the Seaboard picture and their experience in railroad reorganizations they would be best equipped to make recommendations to the Court for fair and equitable modifications of the Special Master's Plan if such modifications were deemed necessary. It was obviously impossible to appoint to such a committee representatives of all of the many different security issues which were involved in the reorganization.

The Committee so appointed conferred with all parties who desired to present their views and thereafter made their report to the Courts recommending certain modifications of the Special Master's Plan, including one modification (the Tertiary Allocation) which, while now criticized by the petitioners, had up to that point been strongly urged by them on the basis of the testimony and recommendations of Mr. Wyer, the expert for the Underlying Committee.

It is not true, as the petition states, that the Committee gave no explanation of the changes which they recommended. They filed a full report and exhibits which appear in Vol. I of the Record at pages 413 to 433. Both the expert employed on behalf of the Underlying Bonds (Mr. Wyer) and the expert employed on behalf of the general mortgage issues (Mr. Kennedy) testified that they believed that the result reached by the Committee was fair. The District Courts arrived at an independent appraisal of the fairness of the modified Plan, not alone on the basis of the report of the Committee and that expert testimony, but primarily on the evidentiary foundation of the entire reorganization record. The District Courts were free to accept or reject, in whole or in part, the

modifications recommended by the Committee, and on the basis of the evidence before them decided to accept those modifications. There was no error in that procedure. *U. S.* v. *Crescent Amusement Company*, U. S. Supreme Court, December 12, 1944, 13 L. W. 4045, 4047.

The opinion, findings and conclusions of the Virginia Court show that the Virginia Court did not relinquish or delegate any part of its judicial responsibility. The petitioners distort the record in saying, that the Committee purported to function in a "*judicial*" capacity. The members of the Committee—all of whom were members of the Bar—stated in their report (R. Vol. I, p. 414) that they "have considered themselves to be in the position of officers of the Courts." That is a normal function of lawyers, and is entirely separate from the judicial function of the Courts.

This procedure was proper and normal procedure in any railroad reorganization, and entirely consistent with the practice of the Interstate Commerce Commission and the Courts in reorganization under Section 77. A similar Committee was appointed by Judge Hincks in the New Haven reorganization case (see *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595, 610 (1943)) to aid the Court in solving the many problems arising in that reorganization. That Committee recommended a reorganization plan differing in many respects from that theretofore approved by the Interstate Commerce Commission. The Interstate Commerce Commission, after hearings, accepted with minor modifications the plan recommended by the Committee and the Court approved that plan with certain additional relatively minor modifications.

In the Central of Georgia reorganization, Judge Lovett appointed a committee of representatives of various groups of creditors to advise with the Trustee under Section 77 in connection with the formulation of a reorganization plan.

In many cases the Interstate Commerce Commission has approved reorganization plans agreed on by substantial groups of creditors even though no formal compromise committee has been designated. The plans recently approved for the St. Louis-San Francisco and the Missouri Pacific were in major substance the plans recommended to the Commission by three bondholders' committees in the case of the Frisco and by a substantial number (but not all) of the interested parties in Missouri Pacific.

This Court recognized in *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939) that compromises among the interested parties were a normal part of the reorganization process. This Court said at page 130:

> "Of course, this is not to intimate that compromise of claims is not allowable under Section 77B. * * * Settlement of such conflicting claims to the *res* in the possession of the court is a normal part of the process of reorganization. In sanctioning such settlements the court is not bowing to nuisance claims; it is administering the proceedings in an economical and practical manner."

In summary, it is clear that the procedure followed by the District Court was proper and entirely in accord with "the accepted and usual course of judicial proceedings." The report of the Committee was received only for the guidance of the Courts, in the nature of "expert testimony". It did not bind any interest which did not ac-

cept it. It was not the report of the Committee, but the judicial action of the District Court in considering and approving the fairness of the recommendations, which had any legal effect. The District Court held that the result accomplished was a fair and equitable result and the Circuit Court of Appeals affirmed that decision. No question is presented which justifies a review of that decision by this Court.

If the Virginia Court had approved the Special Master's Plan without modifications, the Circuit Court of Appeals would have been obliged to sustain the District Court under Rules 52(a) and 53(e)(2) of the Rules of Civil Procedure, and this Court would not have entertained a review of the findings of the District Court on questions of fact. Here, however, the modifications recommended by the Committee and approved by the District Court awarded the Georgia & Alabama bondholders a larger share of new securities than they would have received under the Special Master's Plan, including some First Mortgage Bonds. No First Mortgage Bonds were allotted to them by the Special Master. Petitioners have no cause to complain that they were injured by the modifications which improved their position.

POINT III

No question of "compensation" to the Georgia & Alabama Bonds arises in this case.

This Court held in the *Milwaukee* case (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523, 1943) that a senior creditor required to take inferior securities in a

reorganization was entitled to compensation for the loss of senior rights *if junior creditors were also allowed to participate.* Petitioners seek to bring this case before this Court on the ground that the Georgia & Alabama Bonds did not receive adequate compensation within the rule established by this Court in the *Milwaukee* case.

There can be no question of compensation for the Georgia & Alabama Bonds in this case because no junior creditor is participating in the value of the property securing the Georgia & Alabama Bonds. The full value found for that property by the Special Master and the District Courts was allotted to the holders of the Georgia & Alabama Bonds and no part of that value was allotted to any other creditor. There is, therefore, no reason to "compensate" the Georgia & Alabama Bonds.

The problem in relation to the relative treatment of the Georgia & Alabama Bonds and the other Underlying issues is exactly the same as the problem of the relative treatment of the General Mortgage Bonds and the 50-year bonds which this Court discussed in the *Milwaukee* case. In that case this Court said at page 563:

> "But where, as here, each group of bondholders is contributing to a new system mortgage separate properties from old divisional mortgages, it is necessary to fit each into the hierarchy of the new capital structure in such a way that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. If that is done, each has obtained new securities which are the equitable equivalent of its previous rights, and the full priority rule of the *Boyd* case, as applied to the rights of creditors *inter se*, is satisfied. That rule was applied here. And the determination by the Commission and the District Court that its

requirements were satisfied is supported by evidence. * * *"

POINT IV

Questions as to the methods of determining the relative values of the various properties are not questions of public or general interest.

This Court will not grant certiorari to review the details of the methods adopted by the Special Master and by the District Court in determining relative allotments of securities. This Court did not grant certiorari for that purpose in the *Milwaukee* case or in the *Western Pacific* case (*Ecker* v. *Western Pacific R. Co.,* 318 U. S. 448, (1943)), nor has it ever granted certiorari for that purpose in any case.

Certiorari was granted in the *Milwaukee* and *Western Pacific* cases because those cases involved basic questions of the relative jurisdiction of the Commission and the Courts in proceedings under Section 77 and of the nature and character of findings which had to be made in such reorganizations by the Commission. There were sharp conflicts between the decisions of the lower courts on those matters and reorganizations under Section 77 could not proceed until those basic questions were authoritatively settled. There are no such questions in this case.

Even after it had granted certiorari, this Court did not, in the *Western Pacific* case, consider the correctness of the security allocations made in the Western Pacific Plan except in so far as such allocations depended on a question of law, viz., conflicting lien claims of two mortgages.

In the *Milwaukee* case this Court did discuss certain of the allocations for new securities among the several

issues. This Court, however, expressly refused to review the methods by which the Commission and the District Court had arrived at those allocations, nor did it pass on the allocations as such. This Court said at page 561:

> "The problem in such a case is not a simple one. The contribution which each division makes to a system is not a mere matter of arithmetical computation. It involves an appraisal of many factors and the exercise of an informed judgment. * * * In the present case the Commission and the District Court were satisfied that they had adequate data based on earning power to make a fair allocation of new securities between the general mortgage bonds and the 50-year bonds. We can not say that it was inadequate. * * * *The earning periods to be chosen, the methods to be employed in allocating system earnings to the various divisions, are matters for the informed judgment of the Commission and the Court.* * * *
>
> "We would have quite a different problem if the District Court had failed to perform the functions which Section 77(e) places upon it. But it can not be said that there was any such failure here. * * * Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. *If there is warrant for the action of the District Court, our task on review is at an end.*" (Italics supplied)

In this case there can be no question that the Special Master and the District Court carefully and earnestly performed their "functions," i.e., the determination of a fair and equitable allocation of securities, in accordance with the

general principles laid down by this Court in the *Western Pacific* and *Milwaukee* cases, and the methods followed by the Interstate Commerce Commission in reorganizations under Section 77. Even if this Court were to grant *certiorari* in this case, it would not review the action of the District Court in respect of allocations of securities among the several divisional mortgages. It follows, of course, that this Court will not grant certiorari on the basis of any of the questions presented by the petition (questions 5 to 10, inclusive) which deal solely with matters of allocation.

POINT V

There is no ground for granting the petition.

Paragraph 5 of Supreme Court Rule 38 states that a review on writ of certiorari will be granted only when there are special and important reasons therefor. No such reasons have been shown to exist in this case and it is obvious that petitioners have attempted, by stating a multitude of alleged "questions", to disguise the fact that there is no ground for *certiorari* in this case.

The opinion on rehearing on the *Rutland* case (which petitioners failed to mention) makes it clear beyond question that the *Rutland* decision was not applicable to an equity reorganization started before 1933, as was the Seaboard reorganization, and that there is, therefore, no conflict between that decision and the decision of the Circuit Court of Appeals in this case.

All of the other questions stated in the petition relate only to the procedure adopted by the District Court and the methods approved by it. The procedure which is criticized (*i.e.*, the appointment of the Committee to confer

and suggest) was normal and proper procedure. The question of methods of allocation is, as this Court has stated in the *Milwaukee* case, one for the informed discretion of the District Court and the choice of the appropriate method is dependent on the facts of each case. It would not serve the public interest for this Court to review a specific problem of allocation when its decision could have no application to any other reorganization case.

Accordingly, the petition for certiorari should be denied.

Dated December 26, 1944.

Respectfully submitted,

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Attorneys for Respondents.

SCHEDULE A

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 14500

SEABOARD AIR LINE RAILWAY COMPANY
RECEIVERSHIP

SUBMITTED JUNE 3, 1944. DECIDED AUGUST 12, 1944.

Upon consideration of the application for authority to issue securities under a plan of reorganization in receivership proceedings, found that the record supports the issue of such securities and assumption of obligations in the amounts and substantially of the character proposed, viz,

(1) Issue of not exceeding $32,500,000 of first-mortgage 50-year 4-percent bonds, series A, $52,500,000 of income-mortgage 70-year 4½-percent bonds, series A, $15,000,000 of preferred stock 5 percent, series A, of the par value of $100 a share, and 850,000 shares of common stock without par value, but with a stated value of $100 a share, and such additional shares of common stock not exceeding 675,000 shares as may be necessary to comply with the conversion rights of the income-mortgage 70-year 4½-percent bonds, series A, and the preferred stock, series A, that may be issued under the plan.

(2) Assumption of obligations and liabilities, under the terms and conditions, and to the extent contemplated by the plan,

(a) Of Legh R. Powell, Jr. and Henry W. Anderson, as receivers of the Seaboard Air Line Railway Company, as guarantors, in respect of not exceeding $11,870,000 of receivers' equipment-trust certificates, and of such additional receivers' equipment-trust cer-

tificates, the guaranty of which may be authorized by the Commission prior to the entry of an order herein;

(b) Of the Seaboard Air Line Railway Company or the receivers, or both, as guarantors and lessees, in respect of the following securities: Birmingham Terminal Company first-mortgage 4-percent bonds, $323,333.33; Jacksonville Terminal Company first and general mortgage 5-percent bonds, $100,000, refunding and extension mortgage 5-percent bonds, series A, $2,400,000, refunding and extension mortgage 6-percent bonds, series B, $1,100,000, refunding and extension mortgage 4½-percent bonds, series C, $400,000; Tampa Union Station Company first-mortgage 4-percent bonds, $210,000; and as guarantors in respect of Norfolk & Portsmouth Belt Line Railroad Company 1½-percent promissory notes, $420,000;

(c) Of the Seaboard Air Line Railway Company, or the receivers, or both, as lessee, by lease or operating agreement in respect of the following securities, insofar as rental payments are involved: Athens Terminal Company first-mortgage 5-percent bonds, $200,000; Birmingham Terminal Company, 1500 shares of capital stock of the par value of $100 a share; Durham Union Station Company first-mortgage 5-percent bonds, $60,000, and 333 shares of capital stock of the par value of $100 a share; North Charleston Terminal Company, 1050 shares of capital stock of the par value of $100 a share; Savannah Union Station Company first-mortgage 4-percent bonds, $600,000; Tampa Union Station Company, 300 shares of capital stock of the par value of $100 a share; and Atlanta Terminal Company first-mortgage 4-percent bonds, $1,600,000, and 1500 shares of capital stock of the par value of $100 a share.

LEONARD D. ADKINS for applicant.

REPORT OF THE COMMISSION

DIVISION 4,

COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

By DIVISION 4:

The Seaboard Railway Company, hereinafter called the new company, a newly organized company incorporated for the purpose of engaging in interstate commerce, on March 9, 1944, applied for authority under Section 5 (2) (a) of the Interstate Commerce Act to acquire certain properties and interests in properties, hereinafter described, of the Seaboard Air Line Railway Company, hereinafter referred to as the old company, or its receivers, or both; and on the same date applied for authority under sections 5 (2) (a), 5 (15), and 5 (16) of the act to acquire from the old company or the receivers, or both, certain stock interests and indebtedness of the Baltimore Steam Packet Company, a common carrier by water, Finance Docket No. 14501. On the same date it also filed an application under section 20a of the act seeking authority (1) to issue, under the terms and conditions and to the extent contemplated by a proposed plan of reorganization, hereinafter referred to as the plan, the following securities in temporary form or as interim certificates, or in definitive form, and, if issued either in temporary form or as interim certificates, in definitive form in exchange therefor; and in the first instance, in lieu of fractions of a bond or share of stock, non-interest-bearing or non-dividend-bearing and non-voting scrip certificates therefor, not exceeding $32,500,000 of first-mortgage 40-year 4-percent bonds, series A, $52,500,000 of income-mortgage 50-year 4½-percent bonds, series A, $15,000,000 of preferred stock 5 percent, series A, consisting of 150,000 shares of the par value of $100 a share, and 850,000 shares of common stock without par value; and to issue from time to time such additional shares of common stock up to 675,000 shares, as may be necessary to comply with the conversion rights of the income-mortgage 50-year 4½-percent bonds, series A, and the preferred stock, series A, that may be issued under the plan; (2) to assume, under the terms and conditions and to the extent contemplated by the plan, the obligation and liability of Legh R. Powell, Jr., and Henry W. Anderson, as receivers of

the old company, as guarantors, in respect of not exceeding $11,870,000 of receivers' equipment-trust certificates, and such additional receivers' equipment-trust certificates, the guaranty of which may be authorized by us prior to the entry of an order herein; (3) to assume, under the terms and conditions and to the extent contemplated by the plan, the obligation and liability of the old company or the receivers, or both, as guarantors, and as lessee (except as to Norfolk & Portsmouth Belt Line Railroad notes), in respect of the following securities: $1,940,000 of first-mortgage 4-percent bonds of the Birmingham Terminal Company, $100,000 of first and general mortgage 5-percent bonds, $2,400,000 of refunding and extension mortgage 5-percent bonds, series A, $1,100,000 of refunding and extension mortgage 6-percent bonds, series B, and $400,000 of refunding and extension mortgage 4½-percent bonds, series C, all of the Jacksonville Terminal Company, $420,000 of 1½-percent serial promissory notes of the Norfolk & Portsmouth Belt Line Railroad Company, and $210,000 of first-mortgage 4-percent bonds of the Tampa Union Station Company; (4) to assume the obligation and liability of the old company or the receivers, or both, as lessee by lease or operating agreement, in respect of $200,000 of first-mortgage 5-percent bonds of the Athens Terminal Company, 1,500 shares of capital stock of the par value of $100 each of the Birmingham Terminal Company, $60,000 of first-mortgage 5-percent bonds of the Durham Union Station Company, 333 shares of capital stock of the par value of $100 each of the Durham Union Station Company, 1,050 shares of capital stock of the par value of $100 each of the North Charleston Terminal Company, $600,000 of first-mortgage 4-percent bonds of the Savannah Union Station Company, 300 shares of capital stock of the par value of $100 each of the Tampa Union Station Company, $1,600,000 of first-mortgage 4-percent bonds of the Atlanta Terminal Company, and 1,500 shares of capital stock of the par value of $100 each of the Atlanta Terminal Company, such assumption of obligation and liability to extend only to rental payments in amounts equivalent to interest, dividends, or sinking-fund installments on the above-named securities, and to exclude any obligation of the old company or the receivers, or both, in respect of the principal of, or interest or dividends or sinking-fund installments on these securities. A hearing was held and a brief was filed by the appli-

cant. No representations have been made by State authorities, and no formal objection to the applications has been offered.

The applicant was incorporated under the laws of the Commonwealth of Virginia on January 26, 1944, for the purpose of acquiring by purchase, lease, or otherwise, certain properties and rights and interests now owned by the old company, or operated by it or its receivers, or in possession of either or both.

20a Application to Test Amount of Capitalization

The present application was filed under the provisions of section 20a of the Interstate Commerce Act for the purpose of determining whether the capitalization proposed in the plan would be approved, and a report on this phase of the application has been requested. If the securities contemplated by the plan are disapproved, proceedings under section 77 of the Bankruptcy Act probably will be instituted.

The old company is a consolidated corporation organized in 1915 under the laws of Virginia, North Carolina, South Carolina, Georgia and Florida. At the end of 1943 the receivers operated a railroad system extending from Richmond and Norfolk, Va., in a general southerly direction through the cities of Savannah, Ga., Jacksonville and Miami, Fla., to Homestead on the east coast and St. Petersburg, Tampa, Naples, and other points on the west coast of Florida with branches to Bessemer and Montgomery, Ala., Wilmington, N. C., and various other points, a total operated mileage of all tracks of 5,703.06 miles, which includes 4,076.13 miles of main line, 101.62 miles of branch lines, 64.47 miles of second main track, 562.15 miles of passing tracks, etc., 447.76 miles of way and switching tracks and 450.93 miles of yard switching tracks. This mileage does not include 98.22 miles of switching tracks owned by shippers. At the end of the same year it had 613 locomotives available for service, of which 242 were fully owned, 339 held under equipment trusts, 11 leased and 21 held under other forms of lease or title. Of these 553 were steam locomotives and 60 were Diesels. There were also available for service 17,679 freight-carrying cars and 412 passenger-train cars of all classes, 628 units of company service equipment, and 14 units of floating equipment.

Receivership of Old Company

On December 23, 1930, Legh R. Powell, Jr., and Ethelbert W. Smith were appointed receivers of the properties of the old company by order of the District Court of the United States for the Eastern District of Virginia in a cause entitled *Bethlehem Steel Company* v. *Seaboard Air Line Railway Company in Equity No. 213.* Ancilliary proceedings were also instituted in the District Court of the United States for the Southern District of Florida. Subsequently Smith was succeeded by Henry W. Anderson and the various receivership proceedings were consolidated and are now entitled *Guaranty Trust Company of New York and Merrell P. Callaway, as Trustees, et al.* v. *Seaboard Air Line Railway Company et al. Consolidated Cause in Equity No. 214.* On October 27, 1939, the District Court of the United States for the Eastern District of Virginia in the above-entitled consolidated cause appointed Tazewell Taylor as special master of that court and, among other things, authorized any creditor, security holder, or group or committee representing creditors, security holders ar stockholders, respectively, of the old company or its receivers, with a substantial interest, to petition the court at any time prior to February 1, 1940, unless extended, for leave to intervene in that proceeding for the purpose of proposing a plan of reorganization. On July 20, 1943, the special master submitted his report which included a rceommended plan of reorganization. Hearings were held in respect thereto in October and November 1943, after which the court appointed a conference committee as a result of which modifications of the plan were submitted. The plan as modified was confirmed on December 13, 1943, by the Virginia court and on December 15, 1943, by the Florida court.

Properties to be Acquired by the New Company

The new company was incorporated for the purpose of acquiring approximately 4,178 miles of main line or lines of the old company. Under the plan it is proposed to include in a unified railroad system (a) all the properties heretofore owned outright by the old company, (b) all the wholly owned subsidiaries operated by the old company, (c) subsidiaries partly owned but with some understanding debt or stock held by the public, and (d) leased lines. These properties are now subject, in whole or in

part, to 18 separate mortgages. The proposed plan contemplates a single new system subject to new consolidated system mortgages and the elimination of all prior liens. It is also proposed to acquire all stocks, obligations, securities, or other interests in other companies or separately operated property held by the old company or its receivers at the time the plan is effective, to the extent described. A summary of the properties to be acquired is given following:

I. The lines of railroad and other assets of the old company and of those subsidiary companies which were operated by it prior to the receivership under leases or other operating agreements and are now operated by the receivers of the old company as a part of the Seaboard system:

(a) Wholly owned railroad subsidiaries whose property may or may not be acquired by the receivers before consummation of the plan are:

Brooksville & Inverness Railway

Charlotte Harbor & Northern Railway Company

Prince George & Chesterfield Railway

(b) Railroad terminal subsidiaries with outstanding publicly held securities operated by the old company.—The properties of the following subsidiaries will be acquired; or control thereof resulting from the acquisition by the new company of mortgage bonds of such railroads in exchange for securities or cash pursuant to the plan, and thereafter the properties of such railroads, or control of successor corporations by the acquisition from the receivers, the old company, or the reorganization committee, or from 2 or more of these sources, of the stock of such corporations, and thereafter their properties; or control of the last 3 companies by acquisition of their mortgage bonds in exchange for securities or cash pursuant to the plan, and by the acquisition of all outstanding capital stock and debt of these companies from the old company or its receivers, and thereafter the acquisition of the properties of these companies:

Georgia, Florida & Alabama Railroad Company

Tampa Northern Railroad Company (including its ownership of 100 shares of the 300 outstanding shares of stock of Tampa Union Station Company)

Georgia and Alabama Terminal Company

Tampa & Gulf Coast Railroad Company

Either (i) the properties of the following railroads from the old company or its receivers, or (ii) such control of these railroads as may result from the acquisition by the new company of Seaboard-All Florida first-mortgage bonds from the receivers or the reorganization committee, or both, and thereafter the properties of such railroads for such consideration, if any, in addition to such bonds so acquired as may be submitted to us for consideration prior to the entry of a supplemental order authorizing such acquisition of the properties, or (iii) control of any corporations, successors to such railroads, by acquisition from the receivers or the reorganization committee, or both, of the stock of such corporations, and thereafter their properties. This group consists of

Seaboard-All Florida Railway

Florida Western & Northern Railroad Company

East and West Coast Railway

these 3 being known as the Seaboard-All Florida Lines.

II. *Separately operated lines.*—(a) Control through ownership of the following shares of capital stock of such railroads, such shares now being owned by the old company or held for the benefit of the receivership estate of the old company by its receivers, except insofar as such shares may hereafter and prior to the consummation of the plan be disposed of in exchange for property of the railroad issuing such shares:

Macon, Dublin & Savannah Railroad Company, 17,500 shares of common stock, 100 percent control,

Tavares and Gulf Railroad Company, 2,982 shares of common stock, 100 percent control,

Brooksville and Inverness Railway, 25 shares of common stock, 100 percent control,

Charlotte Harbor & Northern Railway Company, 5,000 shares of preferred, 35,000 shares common stock, 100 percent control,

Prince George and Chesterfield Railway, 50 shares of common stock, 100 percent control,

and (b) the stock interests and other investments of the old company in its following subsidiaries, which were or are separately operated:

Macon, Dublin & Savannah Railroad Company,

Charlotte, Monroe and Columbia Railroad Company (lines abandoned),

Chesterfield and Lancaster Railroad Company (lines abandoned),

Raleigh & Charleston Railroad Company (lines abandoned),

Jacksonville, Gainesville & Gulf Railway (property sold under foreclosure proceedings but operations being continued for account of purchaser),

Tavares and Gulf Railroad Company.

III. *Line owning principally equipment.*—The new company will acquire the assets of the following company, which consist principally of equipment and equipment-trust obligations assumed by the old company. All of the equipment is leased to the old company by agreement dated November 1, 1923, and supplements thereto. The lease has not been affirmed or disaffirmed by the receivers of the old company, but the equipment has been used by the receivers, pursuant to court orders:

The Seaboard-Bay Line Company.

IV. *Water-carrier company securities.*—The new company proposes to acquire all of the funded debt, consisting of $1,500,000, principal amount of debentures, due January 1, 1991, and two 5-percent promissory notes in the principal amount of $90,000 each, due on or before April 1,

1952, and April 1, 1953, respectively, and 50 percent of the capital stock, or 200 shares of common stock of the par value of $1,000 a share, of the Baltimore Steam Packet Company.

V. *Joint control of other carriers.*—The new company will also acquire joint control with other carrriers of the following railroad, express, or terminal companies, through ownership of the shares of stock of each to the extent shown:

Albany Passenger Terminal, 55 shares, $100 par, 4.58 percent

Athens Terminal Company, 125 shares, $100 par, 50 percent

Birmingham Terminal Company, 250 shares, $100 par, 16⅔ percent

Chatham Terminal Company, 250 shares, $100 par, 50 percent

Columbia, Newberry and Laurens R. Co., 3,335 shares, $25 par, 16⅝ percent

Durham Union Station Co., 83⅓ shares, $100 par, 25 percent

Fruit Growers Express Co., 10,777 shares, $100 par, 12.92 per cent

Jacksonville Terminal Co., 938 shares, $100 par, 25 percent

Norfolk & Portsmouth Belt Line R. Co., 72 shares, $100 par, 12½ percent

North Charleston Terminal Co., 350 shares, $100 par, 33⅓ percent

Railway Express Agency, Inc., 17 shares, no par, 1.7 percent

Richmond-Washington Co., 6,675 shares, $100 par, 16⅔ per cent

Savannah Union Station Co., 1,000 shares, $100 par, 33⅓ percent

Tampa Union Station Co., 200 shares, $100 par, 66⅔ percent

The Wilmington Railway Bridge Co., 200 shares, $100 par, 50 percent

VI. *Leasehold interest.*—The new company will acquire the leasehold interests of the old company or its receivers in the properties of the following lessors, except to the extent that such leases may hereafter be disaffirmed by the receivers or the properties of such lessors, except those marked with an asterisk, may hereafter be acquired by the receivers or the new company:

Brooksville and Inverness Railway. Lease of January 5, 1926, as supplemented October 1, 1928, to old company.

Charlotte Harbor & Northern Ry. Co. Lease of March 1, 1928, as supplemented July 23, 1928, to old company.

Prince George and Chesterfield Railway. Lease of January 16, 1930, to old company.

Georgia and Alabama Terminal Company. Lease of December 20, 1898, to Georgia and Alabama Ry., and supplemented thereto, dated January 1, 1925, between terminal company and the old company.

Tampa & Gulf Coast Railroad Company. Lease of January 31, 1927, as supplemented October 1, 1928, to old company

Tampa Northern Railroad Company. Lease of January 5, 1926, as supplemented October 1, 1928, to old company.

*Central of Georgia Railway Company. Lease of March 28, 1896, to Georgia and Alabama Railway, conveyed by latter to a predecessor in title to old company under date of February 20, 1902.

*Georgia Power Company (Columbus Railroad Company, predecessor). Lease of October 31, 1901, between predecessor company and predecessor of old company and supplements thereto.

*McRae Terminal Company. Lease of December 31, 1909, as supplemented August 17, 1914, and November 22, 1924, between terminal company and a predecessor of old company.

VII. *Trackage rights and joint use of facilities.*—The new company will also acquire the rights now vested in the old company or its receivers to trackage over, or joint use of, lines of railroad and terminals owned or operated by the following railroads and terminal companies, except to the extent that the agreements creating such trackage rights or rights of joint use may hereafter be disaffirmed by the receivers or the new company:

Joint Yard, Savannah, Ga. Agreement of May 1, 1916, between Central of Georgia Railway Co., the old company, and the Chatham Terminal Company.

Hilton to Navassa, N. C. Agreement of November 18, 1866, as supplemented May 22, 1909, and May 25, 1926, between the Atlantic Coast Line Railroad Co., or its predecessors, and the old company, or its predecessors or receivers of the old company, covering operations of properties of Wilmington Railway Bridge Co.

River Junction, Fla. Agreement dated February 28, 1908, confirmed November 17, 1910, between the Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, predecessor of old company, or its receivers, and the receiver of the Appalachicola Northern Railroad.

Cuthbert, Ga. Memorandum of agreement, dated December 29, 1923, between Central of Georgia Railway Company and Georgia, Florida and Alabama Railway (assumed by old company).

Savannah, Ga. Agreement dated May 1, 1902, amended March 1, 1920, between Savannah Union Station Company, Southern Railway Company, Atlantic Coast Line Railroad Company, and the old company.

Athens, Ga. Operating agreement, dated February 19, 1943, between the Athens Terminal Company, the receivers, and the Gainesville Midland Railroad Company.

Atlanta, Ga. Agreement dated August 19, 1916, between Atlanta Terminal Company, the old company,

the Southern Railway Company, Central of Georgia Railway Company, Atlanta & West Point Railroad Company, Atlanta, Birmingham & Atlantic Railway Company, and Guaranty Trust Company of New York.

Howells, Ga., to Freight Depot, Atlanta, Ga. Contract dated November 14, 1930, between The Nashville, Chattanooga & St. Louis Railway, Western & Atlantic Railroad and the old company.

Howells, Ga., to Terminal Station, Atlanta, Ga. Agreement dated August 11, 1916, as supplemented July 1, 1921, between Southern Railway Company and the old company, and supplemental agreement dated June 1, 1936, between the receivers and the Southern Railway Company.

Birmingham, Ala. Agreement of April 12, 1917, between the Southern Railway Company, the Alabama Great Southern Railroad Company, Central of Georgia Railway Company, Illinois Central Railroad Company and the old company, as modified by letter agreement dated November 7, 1936, between Southern Railway Company, and the receivers.

Birmingham, Ala. Agreement dated March 1, 1907, as supplemented May 18, 1907, and March 29, 1915, between Birmingham Terminal Company, Southern Railway Company, Illinois Central Railroad Company, a predecessor of old company, Central of Georgia Railway Company, St. Louis & San Francisco Railroad Company, Alabama Great Southern Railroad Company, and The Equitable Trust Company of New York.

Birmingham, Ala. Agreement dated February 12, 1903, as supplemented August 22, 1904, May 13, 1909, and February 1, 1912, between Birmingham Belt Railroad Company and certain predecessors in title of the old company, as amended by agreement dated January 26, 1940, between the receivers and the Birmingham Belt Railroad Company, trustees of St. Louis-San Francisco Railway Company, receiver

of Central of Georgia Railway, and Illinois Central Railroad Company.

Birmingham (Freight Yard Jct.) to Bessemer, Ala. Agreement dated February 12, 1903, as supplemented June 1, 1905, between Kansas City, Memphis & Birmingham Railroad Company and predecessors in title of Seaboard Air Line Railway, a predecessor of the old company.

Montgomery, Ala. Agreement dated November 20, 1899, between Central of Georgia Railway Company and Georgia and Alabama Railway, a predecessor of the old company.

Montgomery, Ala. Agreement effective on and after May 1, 1898, between Louisville & Nashville Railroad Company and Georgia & Alabama Railway, a predecessor in title of the old company, covering use of union passenger station facilities.

Jacksonville, Fla. Agreement dated June 1, 1917, as supplemented October 1, 1921, between Jacksonville Terminal Company, Atlantic Coast Line Railroad Company, Florida East Coast Railway Company, the old company, Southern Railway Company, and United States Trust Co. of New York; also agreement dated April 4, 1939, between Jacksonville Terminal Company, Atlantic Coast Line Railroad Company, the receivers of Florida East Coast Railway, receivers of the old company, Southern Railway Company, and the United States Trust Company of New York.

Tampa, Fla. Agreement dated November 1, 1940, between Tampa Union Station Co., the receivers, and Atlantic Coast Line Railroad Company.

Raleigh to Cary, N. C. Agreement dated January 5, 1915, as supplemented January 1, 1926, between Southern Railway Company and the old company, or a predecessor in title.

Miscellaneous tracks. 3.39 miles of miscellaneous passing, switching, and other tracks owned by other rail-

roads over which the old company has trackage rights.

VIII. *Consideration for acquisition of properties.*—To acquire the properties and rights above described the new company proposes to use presently $5,584,290 of cash, and to issue securities and assume obligations and liabilities as follows:

IX. *Securities Issues:* It is proposed to issue a maximum amount of

$32,500,000 of first-mortgage 40-year 4-percent bonds, series A;

52,500,000 of income-mortgage 50-year 4½-percent bonds, series A;

15,000,000 of preferred stock 5 percent, series A, par value $100;

85,000,000 of common stock without par value, but with stated value of $100 a share; and an an additional amount not exceeding

67,500,000 of common stock, or such part thereof as may be necessary to comply with the conversion rights of the income-mortgage 4½-percent bonds, series A, and preferred stock, series A, as may be issued under the plan.

X. *Assumption of obligation and liability.*—

(a) *Receivers' obligations.* Pursuant to the plan it is proposed to assume obligation and liability of the receivers of the old company, as guarantors, in respect of not exceeding

$11,870,000 of receivers equipment-trust certificates and in respect of such additional amounts of these certificates, the guaranty of which by the receivers may be authorized by us hereafter but prior to the entry of an order herein.

(b) *Obligations of receivers of old company, or both, as guarantors and lessees,* in respect of the following securities:

$1,940,000 of Birmingham Terminal Company first-mortgage 4-percent bonds, due March 1, 1957, guaranteed severally by 6 companies; old company's portion $323,333.33.

*100,000 first and general mortgage 5-percent bonds, due July 1, 1967, guaranteed jointly and severally.

*2,400,000 refunding and extension mortgage 5-percent bonds, series A, due July 1, 1967, guaranteed jointly and severally.

*1,100,000 refunding and extension mortgage 6-percent bonds, series B, due July 1, 1967, guaranteed jointly and severally.

*400,000 refunding and extension mortgage 4½-percent bonds, series C, due July 1, 1967, guaranteed jointly and severally. Those marked with asterisk are securities of Jacksonville Terminal Company.

210,000 first-mortgage 4-percent bonds of Tampa Union Station Company, due October 1, 1958, guaranteed jointly and severally.

(c) *Obligations of receivers or old company, or both, as guarantors,* in respect of the following securities:

$420,000 of Norfolk and Portsmouth Belt Line Railroad Company 1½-percent serial promissory notes, due in annual installments of $70,000 each on September 1 in each year to and including September 1, 1949, guaranteed jointly and severally.

(d) *Obligations of receivers or old company, or both, as lessee,* (by lease or operating agreement) in respect of the following securities, to the extent that the old company, or its receivers, or both, are obligated to pay as rent an amount equivalent to interest,

dividends, or sinking-fund installments on these securities, and without creating or retaining any obligation or liability of the old company or its receivers, or both, in respect of the principal of, or the interest or dividends or sinking-fund installments on these securities:

Athens Terminal Co.—$200,000 of first-mortgage 5-percent bonds. Operating agreement dated February 19, 1943, between that company and the Gainesville Midland Railroad Company.

Birmingham Terminal Company.—1,500 shares of capital stock, $100 par value, owned in equal amounts by 5 lessee companies. Agreement dated March 1, 1907, as supplemented May 18, 1907, and March 29, 1915.

Durham Union Station Company.—$80,000 of first-mortgage 5-percent bonds, due May 1, 1955. Agreement dated May 1, 1905, as amended December 10, 1907, between that company and 4 lessees, 1 the old company's predecessor. Also 333 shares of capital stock, par value $100 a share. Agreement of May 1, 1905, as above. Old company's portion 83⅓ shares.

North Charleston Terminal Company.—1,050 shares of capital stock, par value $100 a share. Owned in equal amounts by 3 lessees, 1 the old company. Agreement dated December 20, 1916, between lessor and lessees.

Savannah Union Station Company.—$600,000 of first-mortgage 4-percent bonds, due April 1, 1952 (includes $276,000 of bonds reacquired and held alive in sinking fund as of January 1, 1944). Agreement dated May 1, 1902, amended March 1, 1920, between station company and 3 lessees, and old company.

Tampa Union Station Company.—300 shares capital stock $100 par value, owned in equal amounts by 3 companies, including old company and 1 of its wholly owned subsidiaries, Tampa Northern Railroad Company.

Agreement dated November 1, 1940, between station company and 2 lessees, receivers of old company and the Atlantic Coast Line Railroad Company.

Atlanta Terminal Company.—$1,600,000 of first-mortgage 4-percent bonds, due August 1, 1969. Agreement dated August 19, 1916, between terminal company and 5 lessees, 1 of which is the old company. The old company pays its user proportion of interest on total issue of $1,600,000 of bonds, but does not contribute to the sinking fund for redemption of these bonds, funds for which are provided in equal proportions by the 3 stockholders. Certain of these bonds have been redeemed and are held alive in sinking fund, but the bonds continue to bear interest. Also 1,500 shares of capital stock, $100 par, owned in equal amounts by Southern Railway Company, Central of Georgia Railway Company, and Atlanta and West Point Railroad Company.

The following securities are to be dealt with in the plan:

(1) *Obligations of receivers.*—A total amount of $11,870,000 of receivers' equipment-trust certificates will be assumed by the new company.

(2) *Seaboard underlying divisional mortgage bonds.*—A total amount of $49,467,526.68, consisting of $30,103,000 of principal and $19,364,526.68 of interest, will be settled by the payment of $2,919,440 of cash and issue of $41,493,169 of various securities.

(3) *Seaboard general-mortgage bonds.*—A total of $188,084,979.61, consisting of $94,115,500 of principal and $93,969,479.61 of interest, will be settled by the issue of $113,617,192 of various securities.

(4) *Seaboard Collateral-trust obligations.*—A total $37,194,943.18, consisting of $21,318,153.00 of principal and $15,876,790.18 of interest, will be settled by the issue of $27,275,612 of various securities.

(5) *Subsidiary railroad and terminal companies, properties of which are operated by receivers as part of the system.*—

A total of $25,215,806.33, consisting of $12,851,000 of principal and $12,364,806.33 of interest, to be settled by the payment of $2,664,850 cash and the issue of $2,454,179 of various securities. Included in this group are the Seaboard-All Florida Lines, the properties of which are to be acquired by foreclosure of the first mortgage instead of by issue of securities. Total claims against these properties amount to $16,214,103, consisting of $7,659,000 of principal, and $8,555,103 of interest. The remaining claims totaling $9,001,703.33, consisting of $5,192,000 of principal and $3,809,703.33 of interest will be settled by the payment of the cash and securities as stated above.

(6) *The Seaboard-Bay Line Co. section 210 loan-deficiency claim.*—A total indebtedness of $349,063.33, which is to be settled by the issue of $159,848 of various securities.

(7) *Unpaid interest not included above.*—A total of $522,-897.75, which is to be paid when due or when conditions of payment are complied with.

Proposed Capitalization

The proposed capitalization and the annual rental, interest, and dividend charges as of January 1, 1944, of the new company, are indicated below:

	To be issued or assumed by new company	Annual charges interest and dividend
Total fixed-interest debt		
Rentals and miscellaneous charges undisturbed		$ 110,000
Undisturbed receivers' equipment trusts	$ 11,870,000	336,000
First-mortgage 40-year 4-percent bonds, series A	32,500,000	1,300,000
Total fixed-interest debt	$ 44,370,000	
Total annual fixed charges		$1,746,000
Discretionary charges		
Capital fund, not in excess of 3¼ percent of total railway operating revenue, or $1,625,000, whichever is greater (less such amounts as may be available for capital expenditures by reason of depreciation of road property)		1,625,000
Sinking fund for first-mortgage bonds, series A, 1 percent		325,000
Total discretionary charges		$1,950,000
Total annual charges prior to interest on income-mortgage bonds		$3,696,000
Contingent-interest debt and charges		
Income-mortgage 50-year 4½-percent bonds, series A	$ 52,500,000	$2,362,500
Sinking fund for income-mortgage bonds, series A		262,500
Total fixed and contingent debt	$ 96,870,000	
Total annual charges before dividends		$6,321,000
Preferred stock 5 percent ($100 par)	15,000,000	750,000
Total par value of securities	$111,870,000	
Total annual charges against income, including preferred stock dividends		$7,071,000
Common stock, no-par, $100 stated value	85,000,000	
Total capitalization	$196,870,000	

Valuation of Properties to be Acquired

Testimony was presented at the hearing tending to show that the cost of reproduction less depreciation of the properties owned by the old company, plus value of lands and rights as of December 31, 1936, was $189,877,155. The net additions and betterments for the period December 31, 1936, to December 31, 1942, were $30,043,303. The sum of these figures is $219,920,458. On May 22, 1931, division 1 in *Seaboard Air Line Ry. Co.*, 35 *Val. Rep.* 337, found the single-sum value as of June 30, 1918, for rate-making purposes, of property of the old company owned and used to be $126,366,000, of which amount $3,866,000 was working capital. For property owned but not used the single-sum value was $510,796. For property used but not owned it was $4,615,372. As of the valuation date the recorded investment in road and equipment was $190,397,699. As of December 31, 1943, similar investment was shown to be $281,759,683, or a net increase in recorded investment of $91,361,984. If this amount be added to the single-sum value of property owned and used ($126,366,000), the sum will be $217,727,984.

Earnings From the Property

A statement furnished by the new company shows the income of the system for the 18-year period from January 1, 1926, to December 31, 1943, inclusive. The annual income available for fixed charges for the period was, in order, $14,560,040, $12,852,122, $12,354,132, $12,094,330, $6,754,033, $3,038,164, $697,800, $3,072,669, $1,980,912, $1,787,931, $3,850,123, $4,120,227, $1,778,525, $3,909,978, $4,700,319, $10,592,465, $34,057,113 and $29,162,712, which is equivalent to an annual average income available for fixed charges of $8,964,000. If the income received for the abnormally low years of 1932, 1934, 1935 and 1938 and the abnormally high years of 1942 and 1943 be eliminated, the average annual income available for fixed charges will be $7,658,317. A witness for the applicant testified that the net income available for fixed charges in the year 1940, adjusted to include the additional returns from increased traffic and reduced maintenance costs, would be $7,498,000 per annum. This amount is considered by the applicant as representative of the earnings available for fixed charges for the present and fore-

seeable future, which view we accept for the purposes of this report. The witness testified in detail regarding the bases upon which he considered the 1940 performance of the receivers of the old company would be affected both by prospective increases in the volume of traffic and lessened expenses for operation resulting from improvement of plant and equipment made in recent years. However, further discussion of that evidence seems to be unnecessary at this time.

As previously shown, the amount of the single-sum value for rate-making purposes plus the increase in investment in property from the date of valuation to December 31, 1943, is $217,727,984. The recorded investment in road and equipment on the same date was $281,759,683. If therefrom there be deducted accrued amortization of defense projects and depreciation aggregating $38,619,353, there remains a depreciated investment in road and equipment of $243,140,330. The proposed capitalization of the new company in the total amount of $196,870,000 is, therefore, materially less than the indicated investment of the old company or the probable rate-making value of the physical property to be acquired.

Earnings from the property available for the payment of fixed charges for the past 18 years have ranged from a low of $697,800 in 1932 to an all-time high of $34,057,113 in 1942 with an annual average of $8,964,644. If such earnings are adjusted by the eliminating of abnormally low returns of the depression years and the high returns of the war period, the annual average will be as previously stated $7,658,317 which supports the applicant's forecast of $7,498,000 as the earnings which might reasonably be received in the future under ordinary conditions. The average annual earnings during the entire 18-year period were sufficient to yield a return of 4½ percent on a capitalization of $199,214,000. Annual earnings determined on the basis of an adjustment, eliminating those of abnormally high and low years, were sufficient for a return of 4½ percent on $170,185,000. The applicant's forecast of normal annual earnings, if realized, would make available earnings sufficient for a return of 4½ percent on a capitalization of $166,622,000.

Clearly, the total of the proposed capital liabilities of the applicant is supported by the showing in the record regarding investment in, and probable rate-making value, on a physical basis, of the property to be continued in transportation service.

There is also support for the proposed securities from an earnings standpoint. As previously shown, the proposed capitalization will require for all annual fixed charges not to exceed $1,746,000. The applicant's forecast of $7,498,000 of earnings available would therefore exceed such charges by $5,752,000. Proposed capital and sinking funds for first-mortgage bonds, to be paid when earned, amount to approximately $1,950,000. The earnings remaining after fixed charges, reduced further by this amount, would be $3,802,000. Income-mortgage interest and sinking fund, amounting to $2,625,207, would reduce to approximately $1,177,000 the earnings remaining and available for dividends. If $750,000 be required for a 5-percent dividend on the preferred stock, there would remain $427,000 for dividends on the no-par common stock.

Upon consideration of the record we are of the opinion that the term of the first-mortgage bonds should be extended to 50 years and that of the income-mortgage bonds should be extended to 70 years. We also are of the opinion that the sinking-fund payments for the first-mortgage bonds and the capital-fund payments should be made mandatory, instead of discretionary as proposed in the plan, and so indicated above, if earnings are available therefor.

Our findings herein will be based upon the assumption that the above changes in the plan are to be made. No order will be entered herein at this time, since the proposals now before us are in a formative state and much remains to be done before the plan can be consummated, and before we can make the findings necessary to the granting of the required authority.

Assuming that the changes indicated above will be made in the plan, we find that the record supports the capitalization proposed by the Seaboard Railway Company in the plan of reorganization of the Seaboard Air Line Railway Company as modified herein, viz,

(1) The issue of not exceeding $32,500,000 of first-mortgage 50-year 4-percent bonds, series A, $52,500,000 of income-mortgage 70-year 4½-percent bonds, series A, $15,000,000 of preferred stock 5 percent, series A, of the par value of $100 per share, and 850,000 shares of common stock without par value, but with a stated value of $100 per share, and such additional shares of common stock not

exceeding 675,000 shares, as may be necessary to comply with the conversion rights of the income-mortgage 70-year 4½-percent bonds, series A, and the preferred stock, series A, that may be issued under the plan, and

(2) The assumption of obligations and liabilities under the terms and conditions and to the extent contemplated by the plan (a) of Legh R. Powell, Jr. and Henry W. Anderson, as receivers of the Seaboard Air Line Railway Company as guarantors, in respect of not exceeding $11,870,000 of receivers' equipment-trust certificates, and of such additional receivers' equipment-trust certificates, the guaranty of which may be authorized by us prior to the entry of an order herein, (b) of the Seaboard Air Line Railway Company or the receivers thereof, or both, as guarantors and lessees, in respect to the following securities: Birmingham Terminal Company first-mortgage 4-percent bonds, $323,333.33; Jacksonville Terminal Company first and general mortgage 5-percent bonds, $100,000, refunding and extension mortgage 5-percent bonds, series A, $2,400,000, refunding and extension mortgage 6-percent bonds, series B, $1,100,000, refunding and extension mortgage 4½-percent bonds, series C, $400,000; Tampa Union Station Company first-mortgage 4-percent bonds, $210,000; and as guarantors in respect of Norfolk and Portsmouth Belt Line Railroad Company 1½-percent promissory notes, $420,000; (c) of the Seaboard Air Line Railway Company, or the receivers thereof, or both, as lessee, by lease or operating agreement, in respect of the following securities, in so far as rental payments are involved: Athens Terminal Company first-mortgage 5-percent bonds, $200,000; Birmingham Terminal Company, 1500 shares of capital stock of the par value of $100 a share; Durham Union Station Company first-mortgage 5-percent bonds, $60,000, and 333 shares of capital stock of the par value of $100 a share; North Charleston Terminal Company, 1050 shares of capital stock of the par value of $100 a share; Savannah Union Station Company first-mortgage 4-percent bonds, $600,000; Tampa Union Station Company, 300 shares of capital stock of the par value of $100 a share; and At-

lanta Terminal Company first-mortgage 4-percent bonds, $1,600,000, and 1500 shares of capital stock of the par value of $100 a share, all as aforesaid.

COMMISSIONER MILLER concurs in the result.

By the Commission, division 4.

W. P. BARTEL,
Secretary.

(SEAL.)